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Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

LULA M. GILDER and BERNICE GILDER,

Petitioners,

v.

JERRY MOORE, d/b/a The Woodville Inn Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SIXTH APPELLATE DISTRICT OF TEXAS AT TEXARKANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Moore ordered the housekeeping employees at his hotel, the Woodville Inn, to work off the time clock. The Gilders refused, and were fired. The Gilders brought a damages claim against Moore for retaliation on the basis of their resistance to involuntary servitude, under the Civil Rights Act of 1867. [42 U.S.C. § 1981, the "Act"]

The Act has been interpreted to provide a remedy to those who suffer retaliation for exercising their rights under the Act. The *prima facie* elements of a § 1981 retaliation claim are:

(1) plaintiff engaged in an activity protected by § 1981;

(2) an adverse action followed; and

(3) there was a *but for* causal connection between the two events.

The Texarkana Court has added a fourth *prima facie* element; a showing of intentional race discrimination.

The question presented is whether intentional race discrimination is an essential element of a § 1981 retaliation claim.

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The Gilders respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals, Sixth Appellate District of Texas at Texarkana, in this case.

OPINIONS BELOW

The Court of Appeals decision, Appendix ["Pet. App."] A, reversing the judgment of the District Court, is published by West Law at 2001 WL 1246429. The decision of the Supreme Court of Texas, denying the Gilders petition for review, Pet. App. B, is unpublished. The decision of the Supreme Court of Texas denying the Gilders' motion for rehearing, Pet. App. C, is unpublished.

STATEMENT OF JURISDICTION

The Supreme Court of Texas denied petitioners' motion for rehearing on February 28, 2002. Petitioners invoke the Supreme Court's jurisdiction under Sup. Ct. Rule 10b. and 10c.

STATUTORY PROVISIONS INVOLVED

The provisions of Title 42 U.S.C. § 1981, relevant to this petition are:

§ 1981 Equal rights under the law

(a) Statement of equal rights

> All person within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full

and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of law.

STATEMENT OF THE CASE

Moore owns the Woodville Inn, a hotel in Woodville, Texas. The hotel's housekeeping employees, among them the Gilders, were ordered to work off the time clock, and threatened with termination if they refused. The Gilders refused, and were fired.

The Gilders brought a federal claim against Moore under § 1981, charging Moore with retaliating against the Gilders on the basis of their resistance to involuntary servitude. The case was tried in the 88th District Court of the State of

Texas, in Woodville, Texas. At the conclusion of the evidence, the Court submitted the case to the jury on the following charge:

QUESTION ONE

Did the Woodville Inn Company discharge those named below because she exercised a right protected by the Federal Civil Rights Act of 1866?

You are instructed that a person exercises a right protected by the Federal Civil Rights Act of 1866 when she resists involuntary servitude.

You are instructed the term "involuntary servitude" means to force a person to work for an employer without pay, and includes a situation where the means used is economic oppression.

You are instructed that the term "economic oppression" includes threatening an employee with termination unless the employee consents to work "off the clock".

You are instructed there may be more than one cause for an employment decision. An employer does not discharge an employee for exercising a protected right if the employer would have discharged the employee when it did even if the employee had not exercised a protected right.

Answer "Yes" or "No".

Lula M. Gilder: _____

Bernice Gilder: _____

The jury answered "Yes" as to each of the Gilders, and awarded damages. The Trial Court awarded interest, attorney fees, and costs.

Moore appealed to the Court of Appeals, Sixth Appellate District of Texas, at Texarkana, Texas. The Texarkana Court reversed the judgment, holding in the absence of proof of intentional race discrimination, § 1981 does not afford protection to those who engage in protected activity. Texarkana Court's Opinion, pages 11 & 14, Pet. App. A. The Texas Supreme Court denied the Gilders' petition for review, as well as the Gilders' motion for rehearing.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the Texarkana Court has decided an important federal question in a way which conflicts with the decision of the United States Fifth Circuit Court of Appeals in the case of *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982). In addition, the *prima facie* elements of a § 1981 retaliation claim, an important question of federal law, have not been, but should be, settled by the Supreme Court.

The Texarkana Court's Holding

"Without a purposeful showing of discrimination, Section 1981 cannot be violated. Since all claims regarding racial discrimination were abandoned by the Gilders, their Section 1981 claims fail as a matter of law." Texarkana Court's Opinion at page 14, Pet. App. A

The Fifth Circuit's *Prima Facie* Elements Of A § 1981 Retaliation Claim

Under Fifth Circuit decisions, intentional race discrimination is not an element of a § 1981 retaliation claim. The *prima facie* elements of a § 1981 retaliation claim are:

> "(1) that [plaintiff] engaged in activity protected by § 1981;
>
> (2) that an adverse employment action followed; and
>
> (3) that there was a [but for] causal connection between the two."

Goff, *supra* at 599

Same Issue, Opposite Result

In *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984), the United States Fifth Circuit Court of Appeals considered the identical issue, absence of proof of intentional race discrimination in a § 1981 retaliation claim, and relying on *Goff*, decided the issue opposite to the Texarkana Court:

> "The District Court found that defendants . . . dismissed [Irby] from his position . . . in retaliation for the filing of an EEOC charge . . . The [District] Court held that . . . Irby failed to prove he was the victim of intentional racial discrimination, and thus could not recover under 42 U.S.C. Section 1981 . . ."

Id., at 1429.

The Fifth Circuit held:

> "The District Court erred in denying Irby's [retaliation] claim under Section 1981 . . . based on the absence of intentional race discrimination."

Id., at 1430

The Gilders' Protected Activity

Moore sought to compel the Gilders to remain at work without pay until given Moore's permission to leave, and to work without pay should Moore be dissatisfied with their work. Moore threatened the Gilders' jobs[1] if they refused. Moore interferred with the Gilders' right to freedom from compelled service.

> "The words 'involuntary servitude' . . . include . . . more than slavery . . . also serfage, vassalage, villenage, peonage, **and all other forms of compulsory service** for the mere benefit or pleasure of others."

Slaughter House Cases, 83 U.S. 36, 90, 21 L. Ed 394 (1873) J: Field dissenting.

> "It is clear that Section 1981 includes protection from involuntary servitude."

Texarkana Court's Opinion, page 10, Pet. App. A.

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1. Although the Gilders' career positions were modest, they were very important to the Gilders.

The Gilders engaged in § 1981 **protected activity** when they refused to work without pay.

Causation

The Gilders' protected activity was followed by an adverse employment action; discharge from employment. The jury determined "but for" causal connection existed between the two events; i.e., Moore purposefully discriminated against the Gilders because they exercised their § 1981 rights. The Gilders proved up the elements of a § 1981 retaliation case.

Absence Of Proof Of Race Discrimination Is Irrelevant In A Retaliation Case

The term "protected activity" includes ***mistaken*** protected activity.

> "Thus, to establish a claim of retaliation, an employee must establish that the employer retaliated against him for opposing conduct which the employee reasonably believed constituted unlawful discrimination."

Benson v. Little Rock Hilton, 742 F.2d 414, 417 (8th Cir. 1984)

> "The merits of a charge [of race discrimination] against an employer is irrelevant to its protected status."

Id., at 416, citing *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969).

CONCLUSION

The Gilders are entitled to the protection they have been denied. This important statute has been the subject of contradictory rulings, and it would serve the underlying purpose of the statute were the Supreme Court to clarify the essential elements of a § 1981 retaliation claim. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE COURT OF APPEALS, SIXTH APPELLATE DISTRICT OF TEXAS AT TEXARKANA SUBMITTED APRIL 3, 2001 AND DECIDED OCTOBER 19, 2001 THE STATE OF TEXAS

In The
COURT OF APPEALS
SIXTH APPELLATE DISTRICT OF TEXAS
AT TEXARKANA

No. 06-00-00097-CV

JERRY MOORE, d/b/a The Woodville Inn Company,

Appellant

V.

LULA M. GILDER and BERNICE GILDER,

Appellees

On Appeal from the 88th Judicial District Court
Tyler County, Texas
Trial Court No. 16,338

Before Cornelius, C.J., Grant and Ross, JJ.
Opinion by Justice Ross

OPINION

Lula Gilder and Bernice Gilder brought suit against Jerry Moore, doing business as The Woodville Inn Company, alleging wrongful termination in violation of the Fair Labor

Appendix A

Standards Act, 29 U.S.C.A. § 215(a)(3) (West 1998) (FLSA), allegedly brought about as a result of their resistance to a condition of involuntary servitude. The Gilders also claimed termination due to race and/or because they exercised their rights under the Thirteenth Amendment to the United States Constitution and the Civil Rights Act of 1866, 42 U.S.C.A. § 1981 (West 1994). The Gilders also alleged that Moore violated Section 1981 by subjecting them, because of their race, to more onerous work than white employees. The Gilders' claims were eventually tried on the issue of termination due to refusal to submit to involuntary servitude. At the close of the plaintiffs' case, Moore moved for an instructed verdict, which was denied. A verdict for the Gilders was returned by the jury. Moore moved for judgment notwithstanding the verdict, which the trial court denied. The Gilders moved for entry of the judgment and attorney's fees. Moore objected, and the Gilders responded. The trial court held a hearing on these matters and entered judgment for the Gilders. Moore now appeals to this Court.

The Gilders were employed by Moore[1] as housekeepers at a hotel. At the time they were fired, Lula[2] had worked for

---

1. Jerry Moore did not actively participate in hotel operations during the relevant events. References to Moore's acts refer to acts of Moore's agents.

2. In a motion for rehearing urged after we issued our original opinion in this case, the Gilders complain in a footnote of our use of their first names only, suggesting that such practice is a carryover from segregation times when "Black persons were customarily addressed and referred to by their first names only. . . ." Where two or more individuals in a given case have the same last name, it is the

(Cont'd)

Moore twenty-seven years and Bernice for twenty-two years. On April 4, 1997, a meeting of housekeeping employees was held at the hotel. At the meeting, Moore stated orally and in writing that:

> EACH DAY WHEN YOU FINISH ROOMS, YOU ARE TO RETURN YOUR CART TO STORAGE AREA, CLOCK OUT AND NOTIFY ROOMS MANAGER OR MOD[3] THAT ROOMS NEED TO BE CHECKED. YOU WILL NOT BE PERMITTED TO LEAVE UNTIL ROOMS HAVE BEEN CHECKED. IF THINGS WERE NOT DONE, YOU WILL STAY, OFF THE CLOCK, AND CORRECT PROBLEM. WE WILL NOT PAY OVERTIME FOR YOU TO GO BACK AND CORRECT PROBLEM THAT SHOULD HAVE BEEN TAKEN CARE OF WHEN YOU ORIGINALLY CLEANED THE ROOM.

(Cont'd)

practice of the writing justice in this case to initially refer to those individuals by their first and last names, and thereafter distinguish between them by reference to their respective first names. *See In re Marriage of Loftis*, 40 S.W.3d 160 (Tex. App. — Texarkana 2001, no pet.); *In re Walters*, 39 S.W.3d 280 (Tex. App. — Texarkana 2001, no pet.); *In re Davis*, 30 S.W.3d 609 (Tex. App. — Texarkana 2000, no pet.); *In re Marriage of Parker*, 20 S.W.3d 812 (Tex. App. — Texarkana 2000, no pet.); *In re Marriage of Morris*, 12 S.W.3d 877 (Tex. App. — Texarkana 2000, no pet.); *McLaurin v. McLaurin*, 968 S.W.2d 947 (Tex. App. — Texarkana 1998, no pet.). This method of distinguishing between individuals who have the same last name is applied without regard to the race or any other personal characteristic of the individuals involved and is not intended to be disrespectful of any person.

3. Manager On Duty.

Appendix A

I CERTIFY THAT I ATTENDED THIS MEETING, AND ROOMS MANAGER DISCUSSED EACH ITEM WITH ME. I FULLY UNDERSTAND THAT THIS IS CONSIDERED A VERBAL WARNING THAT EACH PROCEDURE AND RULE MUST BE DONE ACCORDING TO THESE INSTRUCTIONS. FAILURE TO DO SO, [sic] WILL RESULT IN TERMINATION. I ALSO AFFIRM THAT I HAVE BEEN GIVEN A COPY OF THESE RULES.

That same day the Gilders finished their work, clocked out, and went home. The next day they were terminated. Lula's written reason for termination stated in part that she "[v]iolated company policy and procedures by not waiting to have rooms checked by MOD." Bernice's written reason for termination stated in part that she "was also told that before she could leave her rooms must be checked. She violated company procedures by not doing this."

Before the Gilders' terminations, they were reprimanded on several occasions for failure to follow the company's policies and procedures. Lula and Bernice were each given disciplinary notices on at least three different occasions, as well as personal letters for unsatisfactory work quality, violations of company policies and procedures, and violating safety rules. Both were also individually reprimanded for inefficiency by spending more than thirty minutes cleaning each room, which was against company policy. Both were given notices that failures to increase productivity could result in further disciplinary actions, including termination. The Gilders continued to violate company policies, and according to Moore, this was the cause of their discharges.

Appendix A

Moore asserts three points of error. He contends the trial court erred by submitting an improper jury charge, by entering judgment on the verdict since the evidence was legally and factually insufficient, and by awarding attorney's fees since the evidence was insufficient to support such award.

Moore asserts that the trial court's jury charge was erroneous in two respects. First, the charge contained a cause of action that was either improperly pled or was abandoned by the Gilders. Second, the charge submitted did not include Moore's questions related to the FLSA or Moore's explanatory instructions.

The jury charge asked:

> **Did the Woodville Inn Company discharge those named below because she exercised a right protected by the Federal Civil Rights Act of 1866 [Section 1981]?**
>
> You are instructed that a person exercises a right protected by the Federal Civil Rights Act of 1866 [Section 1981] when she resists involuntary servitude.
>
> You are instructed the term "involuntary servitude" means to force a person to work for an employer without pay, and includes a situation where the means used is economic oppression.
>
> You are instructed that the term "economic oppression" includes threatening an employee with termination of employment unless the employee consents to work "off the clock".

Appendix A

> You are instructed there may be more than one cause for an employment decision. An employer does not discharge an employee for exercising a protected right if the employer would have discharged the employee when it did even if the employee had not exercised a protected right.

Moore contends that this jury charge was improper. The charge submitted was based on violations of Section 1981, although the Gilders abandoned all claims of racial discrimination before trial. The Gilders' sole claim was on the issue of involuntary servitude. Moore contends that the claims based on Section 1981 were abandoned and that it was error for the trial court to submit a jury question based on those claims. Moore further contends the charge was improper because there were no pleadings to support the question submitted and the issue was not tried by consent, there was no evidence of racial discrimination to support the question, the question was based on TEXAS PATTERN Jury Charges PJC 107.5 (1997), which relates to workers' compensation, and the question omitted the element of the defense regarding legitimate nondiscriminatory reasons for the discharges. Moore also complains that the charge failed to instruct the jury that it was the Gilders' burdens to prove that the reasons for the terminations offered by Moore were mere pretexts for discrimination.

To preserve error in the charge, a party must make objections to the defective submissions in the court's charge or submit requests for additional questions, definitions, or instructions that are omitted from the charge. *Flo Trend Sys., Inc. v. Allwaste, Inc.*, 948 S.W.2d 4, 10 (Tex. App. — Houston [14th Dist.] 1997, no writ); *see* TEX. R. CIV. P. 272-274. Moore objected and error was preserved.

Appendix A

The trial court has considerable discretion in submitting the case to the jury. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974); *Am. Home Assurance Co. v. Brandt*, 778 S.W.2d 141, 143 (Tex. App. — Texarkana 1989, writ denied); *see* TEX. R. CIV. P. 277. But, each requested jury question must be supported by the pleadings and the evidence. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 391 (Tex. 1997); *see* TEX. R. CIV. P. 278.

The improper submission of questions constitutes reversible error when harm is suffered. *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 749-50 (Tex. 1980); *Wakefield v. Bevly*, 704 S.W.2d 339, 348 (Tex. App. — Corpus Christi 1985, no writ). Whether harm has been suffered may be considered in light of the charge as a whole. *Bailey*, 609 S.W.2d at 750.

Moore's contention that the charge was not supported by the pleadings fails. In their original petition, the Gilders pled involuntary servitude as a cause of action under the FLSA. The complaint that the Gilders were subjected to work conditions more onerous than those required by whites is pled as a cause of action under Section 1981. The purpose of pleadings is to give fair notice. *See* TEX. R. CIV. P. 45. Moore was given notice under the pleadings. The Gilders stated in open court that they were abandoning their claim based on racial discrimination and that the only claim they were bringing was for "involuntary servitude — retaliation on the basis of the Plaintiffs' resistance to a condition of involuntary servitude, not race." Further, in response to Moore's request for disclosure, the Gilders stated that the legal theory of their lawsuit was that Moore violated the anti-retaliation provision of the

FLSA by discharging them because they resisted involuntary servitude. The Gilders contend there is no requirement to specify the offended statutes during discovery. *See* TEX. R. CIV. P. 194.2(c) cmt. 2 (discovery respondent not required to "brief legal issues" or disclose more than "basic assertions").

Although the Gilders disclosed the wrong vehicle (the FLSA) for their cause of action, Moore was still on notice that the Gilders would be asserting involuntary servitude under Section 1981 as the basis for their lawsuit. Before trial, the Gilders provided a proposed jury charge which included the involuntary servitude claim as arising under Section 1981. Moore objected to this proposed charge on the basis of failure to disclose, but the trial court found that fair notice had been given. We agree that Moore had adequate notice.

Moore also contends there was no evidence of racial discrimination to support the jury question submitted. In objections to the charge, Moore further argued there were legitimate nondiscriminatory reasons for discharging the Gilders and that the trial court erred by not submitting a charge that conformed with the federal burden-shifting analysis used when discriminatory treatment is alleged to have occurred. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43, 120 S.Ct. 2097, 147 L.Ed.2d 105, 116-17 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07, 113 S.Ct. 2742, 125 L.Ed.2d 407, 415-16 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207, 215 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 36 L.Ed.2d 668, 677-78 (1973).

Moore further contends that the jury charge was an improper statement of the law. Moore's contention is that

involuntary servitude is not the type of activity that comes under the provisions of Section 1981. Moore is correct that involuntary servitude is not expressly enumerated in the federal statute.[4] The main focus of Section 1981 is to grant to all people rights "enjoyed by white citizens."[5] The term "economic oppression" as defined in the court's charge to the jury is also not a part of the statute. *See* 42 U.S.C.A. § 1981. Moore contends that to prove a claim under Section 1981, the Gilders were required to show they were not afforded the full and equal benefit of the law as enjoyed by white people, not that they were forced to work off the clock.[6]

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4. 42 U.S.C.A. § 1981(a) (West 1994) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

5. 42 U.S.C.A. § 1981 (West 1994) is based on the Thirteenth Amendment to the United States Constitution, and it was originally enacted in the Civil Rights Act of 1866. *Lewis v. Bethlehem Steel Corp.*, 440 F.Supp. 949, 964 (D. Md.1977).

6. It should be noted that under a direct federal cause of action, involuntary servitude has been defined. The term "involuntary servitude" necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion

(Cont'd)

It is clear that Section 1981 includes protection from involuntary servitude. The sole purpose of Section 1981 was to enforce the Thirteenth Amendment. *See Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 439 n. 11, 93 S.Ct. 1090, 35 L.Ed.2d 403, 410 n. 11 (1973). It has long been settled that the Thirteenth Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Memphis v. Greene*, 451 U.S. 100, 120, 101 S.Ct. 1584, 67 L.Ed.2d 769, 785 (1981) (quoting *Civil Rights Cases*, 109 U.S. 3, 20, 3 S.Ct. 18, 27 L.Ed. 835, 842 (1883)). The underlying purpose of Section 1981 was to enforce Thirteenth Amendment rights, including the right to freedom from "all . . . forms of compulsory service." *Slaughter-House Cases*, 83 U.S. 36, 90, 21 L.Ed. 394, 413 (1873).

However, discrimination is a key element when asserting a cause of action under Section 1981. *See* 42 U.S.C.A. § 1981; *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375,

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(Cont'd)

through law or legal process. *United States v. Kozminski*, 487 U.S. 931, 952, 108 S.Ct. 2751, 101 L.Ed.2d 788, 811 (1988). Although *Kozminski* involved a criminal charge of indentured servitude, the Fifth Circuit has essentially extended the definition to civil cases. *Channer v. Hall*, 112 F.3d 214, 217 (5th Cir. 1997); *see Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990). In civil actions involuntary servitude has been held to constitute an action by the master causing the servant to have, or to believe he/she has, no way to avoid continued service or confinement. When the employee has a choice, even though it is a painful one, there is no involuntary servitude. A showing of compulsion is thus a prerequisite to proof of involuntary servitude. *Channer*, 112 F.3d at 217-18 (citing *Watson*, 909 F.2d at 1552).

388-89, 102 S.Ct. 3141, 73 L.Ed.2d 835, 848-49 (1982). The United States Supreme Court has found that Section 1981 can only be violated by purposeful discrimination.[7] *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388-91. The primary thrust of Section 1981 has been to deal with discrimination in the employment context.[8] *See* 42 U.S.C.A. § 1981; *Davis v. County of Los Angeles*, 566 F.2d 1334, 1340 (9th Cir. 1977), *vacated on other grounds*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979); *Carter v. Gallagher*, 452 F.2d 315, 325 (8th Cir. 1971). Therefore, Moore is correct that discrimination is vital to maintenance of a Section 1981 cause of action and that a Section 1981 claim cannot be sustained without a showing of purposeful discrimination.

In a motion for rehearing, the Gilders assert that Section 1981 affords them a remedy for their alleged retaliation claims without corresponding claims for discrimination and quote the following language from *Goff v. Cont'l Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982): "Section 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute." However, the context of this quotation makes clear this case did involve a claim of racial discrimination:

---

7. The purpose of 42 U.S.C.A. § 1981 is to deal with claims of discrimination. *See generally* David B. Sweet, J.D., Annotation, *Supreme Court's Views as to Constitutionality, Construction, and Application of 42 USCS § 1981, Providing for Equal Rights as to such Matters as Contracts and Legal Proceedings*, 105 L.Ed.2d 737 (1991).

8. The prohibitions of Section 1981 encompass private as well as governmental action. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 387-88, 102 S.Ct. 3141, 73 L.Ed.2d 835, 848-49 (1982).

> We hold that § 1981 does encompass claims of retaliation when an adverse action is taken in response to a person's filing of an EEOC charge or civil rights lawsuit *in which racial discrimination is alleged.* . . . Were we to protect retaliatory conduct, we would in effect be discouraging the filing of meritorious civil rights suits and sanctioning further *discrimination* against those persons willing to risk their employer's vengeance by filing suits. *Section 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute.*

Id. (emphasis added).

The Gilders also point the Court to *Shackelford v. DeLoitte & Touche, L.L.P.*, 190 F.3d 398 (5th Cir. 1999). In a footnote, the *Shackelford* court said, "evidence sufficient to support a claim of retaliation is not necessarily sufficient to support a claim of discrimination 'because of' race." *Id.* at 405 n. 4 The Gilders attempt to use *Shackelford* to say again that a Section 1981 claim for retaliation does not require proof of racial discrimination. We disagree.

Shackelford sued DeLoitte & Touche for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, et seq.; 42 U.S.C.A. § 1981, and the Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. § 21.001, et seq. *Shackelford*, 190 F.3d at 403. Shackelford specifically accused DeLoitte & Touche of wrongful termination based on racial discrimination and based on

retaliation for engaging in activity protected by Title VII. *Id.* The trial court in *Shackelford* granted DeLoitte & Touche's motion for summary judgment on all claims. Shackelford appealed the summary judgment. The Fifth Circuit affirmed in part, reversed in part, and remanded for further proceedings consistent with the opinion. *Id.* at 401.

The court affirmed the summary judgment on the claim of discrimination. *Id.* at 405-06. The court found that Shackelford met her *prima facie* case of discrimination and thereby successfully raised a presumption of discrimination. *Id.* at 404. The burden then having been shifted to the defendant, DeLoitte & Touche rebutted the presumption by providing a legitimate, nondiscriminatory reason for its actions. *Id.* Once DeLoitte & Touche satisfied its burden of rebutting the presumption, Shackelford was required to prove the proffered reasons were pretextual. *Id.* Once a Title VII case reaches the pretext stage, the only question on summary judgment is whether there is a conflict in substantial evidence to create a jury question regarding discrimination. *Id.* The court in *Shackelford* found "[the] evidence, even when viewed in the light most favorable to Shackelford, is insufficient to create a jury question regarding the discriminatory termination claim." *Id.* at 405.

The standards for proving a discrimination claim and a retaliation claim are different. *Id.* at 405 n. 4. Though the court affirmed the trial court on the discrimination claim, it reversed the trial court on the claim of retaliation, finding there was sufficient evidence to support an inference that retaliation was the "but for" cause of Shackelford's termination. *Id.* at 407. However, the court reached this point

because the case reached the pretext stage: "Since this case reached the pretext stage, the only question on summary judgments is whether the evidence of retaliation, in its totality, supports the inference of retaliation." *Id.* The court reversed and remanded the claim of retaliation because it found sufficient evidence to support an inference that retaliation was the "but for" cause of Shackelford's termination. *Id.*

Shackelford is distinguishable from this case. *Shackelford* involved claims under Title VII, Section 1981, and the Texas Commission on Human Rights Act. This case involves only a claim under Section 1981. The Gilders dropped all their discrimination claims and relied solely on their claims of involuntary servitude under Section 1981. Under a Section 1981 claim, discrimination is a key element. *See* 42 U.S.C.A. § 1981; *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388-89, 102 S.Ct. 3141, 73 L.Ed.2d 835, 848-49 (1982). Without a purposeful showing of discrimination, Section 1981 cannot be violated. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388-91.

Since all claims regarding racial discrimination were abandoned by the Gilders, their Section 1981 claims fail as a matter of law. The improper submission of issues constitutes reversible error when harm is suffered. *Bailey*, 609 S.W.2d at 749-50; *Wakefield*, 704 S.W.2d at 348; *see* TEX. R. CIV. P. 434. As the Section 1981 action cannot be sustained due to the abandonment of any allegation regarding discrimination, and all other claims asserted by the Gilders have likewise been abandoned, the judgment of the trial court was in error. It is not necessary to address Moore's other contentions.

Appendix A

The judgment is reversed, and judgment is hereby rendered in favor of Moore.

s/ Donald R. Ross
Donald R. Ross
Justice

Date Submitted: April 3, 2001
Date Decided: October 19, 2001

Appendix A

THE STATE OF TEXAS

COURT OF APPEALS
SIXTH APPELLATE DISTRICT OF TEXAS

JUDGMENT

No. 06-00-00097-CV

Jerry Moore, d/b/a The Woodville Inn Company,

Appellant

V.

Lula M. Gilder and Bernice Gilder,

Appellees

Appeal from the 88th Judicial District Court
of Tyler County, Texas (Tr. Ct. No. 16,338).
Opinion delivered by Justice Ross, Chief Justice Cornelius
and Justice Grant participating.

BE IT REMEMBERED, that in accordance with the Court's opinion of this date, the Court finds that there was error in the judgment below. Therefore, it is **ORDERED** that the judgment of the court below is **REVERSED**, and judgment is hereby **RENDERED** in favor of appellant, Jerry Moore, d/b/a The Woodville Inn Company.

It is further **ORDERED** that the appellees, Lula M. Gilder and Bernice Gilder, jointly and severally, pay all costs incurred by reason of this appeal.

RENDERED OCTOBER 19, 2001
BY ORDER OF THE COURT
WILLIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST:
Linda Rogers, Clerk

APPENDIX B — THE SUPREME COURT OF TEXAS DENYING THE PETITION FOR REVIEW DATED JANUARY 17, 2002

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

January 17, 2002

Mr. Robert M. Wood
210 South Village
Woodville, TX 75979

Mr. Dean Miles Blumrosen
2990 Richmond, Suite 650
Houston, TX 77098

RE: Case Number 01-1180
Court of Appeals Number: 06-00-00097-CV
Trial Court Number: 16338

Style: LULA M. GILDER & BERNICE GILDER
v.
JERRY MOORE D/B/A THE WOODVILLE INN

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Appendix B

Sincerely,

John T. Adams, Clerk

by s/ Jessica L. Vlasac
Jessica L. Vlasac, Deputy

cc: Ms. Linda Rogers, Clerk
Ms. Patricia Brown, Clerk

APPENDIX C — THE SUPREME COURT OF TEXAS DENYING THE MOTION FOR REHEARING DATED FEBRUARY 28, 2002

THE STATE OF TEXAS

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

February 28, 2002

Mr. Robert M. Wood
210 South Village
Woodville, TX 75979

Mr. Dean Miles Blumrosen
2990 Richmond, Suite 650
Houston, TX 77098

RE: Case Number: 01-1180
Court of Appeals Number: 06-00-00097-CV
Trial Court Number: 16338

Style: LULA M. GILDER & BERNICE GILDER
v.
JERRY MOORE D/B/A THE WOODVILLE INN

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Appendix C

Sincerely,

John T. Adams, Clerk

by s/ Patricia A. Cook
Patricia A. Cook
Chief Deputy Clerk

cc: Ms. Linda Rogers, Clerk
Ms. Patricia Brown, Clerk